MAR. 10 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

_____ Term, 1972

NO. 71-1162

DR. N. JAY ROGERS, ET AL, *Petitioners*

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Respondent*

PETITION FOR WRIT OF CERTIORARI

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DR. N. JAY ROGERS, ET AL, *Petitioners*

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Respondent*

PETITION FOR WRIT OF CERTIORARI

To The Honorable Supreme Court of the United States:

Dr. N. Jay Rogers and Dr. S. J. Rogers, optometrists in Texas pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on December 21, 1971.

Opinion Below

The opinion of the District Court is found at 316 F. Supp. 422 and is Appendix A hereto. The three opinions of the Judges of the Court of Appeals are not yet reported and are appended hereto as Appendix B.

Jurisdiction

The judgment of the Court of Appeals was entered December 21, 1971. Petitioners' timely Petition for Rehearing en banc was overruled January 31, 1972, following which Petitioners' Motion for Appropriate Stay of Mandate was granted on February 10, 1972. The jurisdiction of this Court is invoked under 28 USC 1254(1).

Questions Presented

1. Whether a District Court judgment "modifying or setting aside" an administrative subpoena or "demand for access to evidence" under 42 USC Section 2000e-9 is tested on appeal by "abuse of discretion."

2. Whether patient records of an optometrist are discoverable by Equal Employment Opportunity Commission investigating a charge of employment discrimination.

3. Whether records of patient treatment by an optometrist are *relevant and material* to an inquiry of discrimination in employment covered by Title VII.

4. Whether an employee is legally "aggrieved" under Title VII by a procedure of a private optometrist directed toward a patient and not the employee.

Statutes Involved

The statutory portions of the Civil Rights Act of 1964 here involved are 42 USC 2000e-2(a), 42 USC 2000e-9(a), and 42 USC 2000e-9(c). Their relevant portions are printed in Appendix C.

Statement of the Case

Petitioners are licensed, practicing optometrists who operated a professional office in Houston, Texas; under the name "Texas State Optical". Upon April 8, 1969, they terminated an employee, Mrs. Josephine Chavez; who upon the next day filed a complaint of *employment discrimination* against Petitioners upon Form "EEOC-5".

In their entirety, the allegations of discrimination charged:

> "The above company has discriminated against me because of my national origin Spanish Surnamed American by:
>
> a. Terminated me from my job without a reason. I was the only Spanish Surnamed American employed with seven Caucasian females who abused me. The manager told me my work was all right but he had to let me go because of friction.
>
> b. Segregating the patients".

In the course of investigation, the Equal Employment Opportunity Commission (herein "EEOC") served an administrative subpoena or "Demand for Access to Evidence" upon Petitioners seeking records and information relating to Petitioners' *patients*.

Tendering all "evidence reasonable and relevant to the inquiry", Petitioners availed themselves of 42 USC 2000e-9(c) and brought this suit seeking judicial limitation of the administrative demand for access *to patient records.*

The District Court ordered much of the discovery completed but granted Petitioners' prayer for protection of *patient records* from disclosure.

Equal Employment Opportunity Commission:

1. Made no effort to show good cause for the evidence contained in the patient records which it sought;

2. Did not seek an "in camera" review of the records by the trial court;

3. Did not seek leave to modify or amend either the charge or the subpoena; and

4. Did not ask the trial court to retain jurisdiction of the matter pending further investigation, at which time the information sought may have proved clearly discoverable or purely academic.

5. And has never contended the trial court abused his discretion in denying disclosure of patient records.

The order of the District Court is "final" and appealable. 28 USCA Section 1291. *Overnite Transportation Co. v. EEOC*, 397 F.2d 368, 369 (5th Cir., 1968).

The Court of Appeals, in three separate opinions, reversed the District Court, and ordered discovery of the patient records.

Reasons for Granting the Writ

There is no reported decision like this. Yet, the procedure involved inheres in every complaint filed under Title VII of the Civil Rights Act of 1964.

For the EEOC is by such Congressional Act empowered to conduct an investigation into charges of "unlawful em-

ployment practices", 42 USC Section 2000e-5(a) and during the course of such investigation "shall at all reasonable times have access to—evidence of any person being investigated—*that relates to unlawful employment practices covered by this title and is relevant to the charge under investigation*". 42 USC Section 2000e-8(a).

In the context of this case, the evidence sought must "relate to unlawful employment practice covered by this title *and* (be) relevant to the charge under *investigation*". Section 709(a).

It is significant:

1. At no time in these proceedings has EEOC contended that the patients' records—as contrasted with employee personnel records—*relate* to unlawful employment practices;

2. No direct statutory authority exists for the compulsory disclosure of patient records;

3. No case authority exists for the compulsory disclosure of patient records;

4. The Regulations of EEOC do not require the keeping of such records.

5. Regardless of the complete inapplicability of the information sought to the "charge", the employer has only one opportunity to seek protection from such "demand"; and then he must go to Federal Court to do so. If he does not seek judicial limitation of the administrative subpoena within 20 days, he is foreclosed from objecting to the evidence. 42 USC 2000e-9(e); *Overnite Transportation Co. v. EEOC*, 397 F.2d 368 (5th Cir., 1968). This is

the compelling reason for testing the District Court order by "abuse of discretion".

The characterization, classification or treatment reflected by the private optometrists' patient records would not relate:

1. To the failure to hire, or

2. To the discharge of an individual, or

3. To treatment of such employee different from any other employee because of such employees race, color or origin. See 703(a)(1); Section 703(a)(2).

Any characterization, classification or treatment of a patient would operate *toward the patient* and not toward an employee. It would not "make a distinction" or "make a difference in treatment or favor" of one employee or another, based on any of the forbidden criteria. Hence, the charge and investigation could not relate to an unlawful employment practice.

Never in the Complaint does Mrs. Chavez contend she was discriminated against because of her national origin, 42 USC Section 2000e-2(a)(1). She is not of Spanish-American ancestry. Hence, in the Court of Appeals EEOC's principal argument was that discrimination lay in the fact "Mrs. Chavez was offended by segregation practices directed against others who are of another ethnic group, and who are not employees."

The District Court opinion says:

> "We must emphasize the failure of Mrs. Chavez's complaint in this regard to show that she is aggrieved in a manner contemplated by Title VII. As it has been explained to the Court, Mrs. Chavez claims

> that Petitioners afford their patients different treatment according to their ethnic origins. It is not alleged that, for instance, Mrs. Chavez is required or permitted to attend only to patients of a certain ethnic origin and not to others. Such a complaint might indicate a classification of employees such as is prohibited by Section 703. That is not our case. Mrs. Chavez claims only that she is offended by the manner in which her former employers treated their customers." 316 F.Supp. 422, 425

The Court of Appeals took three different views, best summarized by Judge Godbold:

> "I accept a construction of Mrs. Chavez's charge which EEOC has urged upon this court as an alternative to the construction preferred (and accepted as being within the statute) by Judge Goldberg, and preferred (but considered as outside the statute) by Judge Roney. It is that Mrs. Chavez' charge could be considered as describing discrimination practiced against her in that she, because of her ethnic status as a Spanish surnamed American, was permitted or required by her employers to attend or to have contact with only segregated patients, and that this would be an unlawful employment practice under subsections (a)(1) and (2). (opinion page 30; Appendix B)

Nowhere did the Court of Appeals, confronted with four different judicial interpretations of the same expression in a lay-drawn charge, employ the only suitable test to this preliminary discovery proceeding. Nowhere did the Court of Appeals say:

> "Whether there should be a disclosure is within the discretion of the trial court, and, like other discre-

> tionary matters, the determination of the court should be made by a balancing of interest." *Brown v. Thompson,* 430 F.2d 1214 (5th Cir., 1970)
>
> or
>
> "In discovery matters, our review is confined to determining whether the District Court abused its discretion." *Montecatini v. E. I. duPont de Nemours & Co.,* 434 F.2d 70, 72 (3rd Cir., 1970)

This is a most preliminary proceeding. After discovery is complete EEOC may or may not conciliate any differences, and private litigation may or may not arise. 42 USC 2000e-5(e)

However, because of the failure of the Court of Appeals to employ the rational test of "abuse of discretion" to a case they classify as being "in a preliminary and undefinitive posture" (p. 1) and which has:

> "presented at the appellate level a problem consuming many hours of judicial labor, producing three different views and no opinion of the court, concerning a question of discovery arising from an administrative proceeding where facility should be a watchword, and all in an appeal that possibly might have been avoided. Not only is it unnecessary for us to reach the primary construction asserted by EEOC, but in the circumstances of this case as a matter of judicial administration of our own affairs, it is inappropriate that we do so." (opinion pages 33-34, Appendix B)

As the Chief Justice so aptly noted:

> "Where courts are not able to keep up with their work, it suggests the need for a hard new look at

our procedures". Burger, *The State of the Judiciary —1970*, 54 A.B.A.J. 933 (1970).

While attention is properly devoted to *"Exorcising The Devil of Appellate Court Delay"*, 58 A.B.A.J. 149 (1972), application of any measure other than "abuse of discretion" to discovery appeals in civil rights litigation will absolutely destroy our court system. In 1971 alone 29,251 charges of employment discrimination were filed with EEOC.[1] If 3% alone led to the judicial record of this case[2] an entire Circuit Court of Appeals would be necessary to handle these discovery proceedings and nothing else.[3]

To preserve our judicial system and effectuate the congressional purpose of administrative investigation and conciliation the Supreme Court must quickly intervene and say—"in non-interlocutory discovery appeals—the trial court order will only be reversed for abuse of discretion." Otherwise, the system will collapse of its own weight.

In this case four judges confronted the matter. Each reached a different conclusion and interpretation of its meaning and effect. On its face this shows there was by the trial court no abuse of discretion in limiting preliminary discovery.

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1. Compilation of "Case Handling Reports"; Equal Employment Opportunity Commission.

2. Filed in District Court March 4, 1970; District Court Order July 27, 1970; Court Appeals order December 21, 1971; mandate stayed to March 11, 1972.

3. Edwards, op. cit., 58 A.B.A.J. 149 (1972).

Prayer

Petitioners pray that the Court issue the Writ of Certiorari, reverse the judgment of the Court of Appeals and determine there was no abuse of discretion by the District Court in limiting preliminary discovery.

Respectfully submitted,

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APPENDIX A

DR. N. JAY ROGERS et al., Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Respondent

Civ. No. 6590

United States District Court,
E. D. Texas,
Beaumont Division.
July 27, 1970.

Robert Q. Keith, Mehaffy, Weber, Keith & Gonsoulin, Beaumont, Tex., for petitioners.

Marian Halley, Equal Employment Opportunity Commission, Washington, D.C., for respondent.

MEMORANDUM OPINION AND ORDER

FISHER, Chief Judge.

Petitioners have brought this action pursuant to §710 (c) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-9(c), seeking to have the Court modify a demand by the Equal Employment Opportunity Commission for production of certain evidence. The Commission, by cross petition, seeks to enforce its demand,

which was issued in connection with an investigation of a charge of unlawful employment practices.

Petitioners are optometrists doing business as "Texas State Optical." On or about April 11, 1969, Mrs. Josephine Chavez filed with the Commission a verified charge of employment discrimination against Texas State Optical. The charge stated in full:

> "The above company has discriminated against me because of my national origin Spanish Surnamed American by:
>
> a. Terminated me from my job without a reason. I was the only Spanish surnamed American employed with seven Caucasian females who abused me. The manager told me my work was alright but he had to let me go because of friction.
>
> b. segregated the patients."

The Commission commenced an investigation of the charge, serving a copy thereof on Petitioners on May 9, 1969. The formal demand was served later when the Commission became dissatisfied with the extent of voluntary compliance by Petitioners. In this action Petitioners complain of overbreadth in that demand.

[1-3] Petitioners have also filed herein certain interrogatories propounded to the Commission pursuant to Rule 33, Fed. R. Civ. Proc., to which interrogatories the Commission has filed its objections. In this connection, Petitioners have asked the Court to determine the merits of the underlying controversy. We agree with the Commission that §710 provides only for a judicial test of the validity of an administrative subpoena, and Petitioners cannot at this stage of the administrative proceedings con-

vert this action into an ordinary lawsuit for the purpose of employing the Court's discovery processes. Neither can the merits of the controversy be litgated in an enforcement proceeding such as the Commission's cross action. Accordingly, the Commission's objections to Petitioners' interrogatories are sustained.

The only issue properly before the Court is Petitioners' contention that the demand here in question is overbroad and should be limited. From oral argument it appears that the real dispute centers upon the items numbered 6 and 7 in the demand, which are set out in the margin.[1] These seek information pertaining to or contained in records of patients which are kept by Petitioners in the course of their business. Petitioners maintain that these matters are not relevant to the Commission's inquiry into the charge of unlawful employment practices. The Commission argues that it is entitled to this information because the complainant, Mrs. Chavez, has indicted Petitioners with having "segregated the patients" and that such a practice, though not directed against Mrs. Chavez,

1. "6. A written response to the following questions:
a. Does Texas State Optical instruct its employees at any of its Houston facilities to fill in Negro patients' applications for service with red ink or red pencil and to use black or blue ink of pencil for patients other than Negroes.
b. Has Texas State Optical ever so instructed its employees at any Houston facility or elsewhere?
c. Do Texas State Optical records of patients for service at its 306 Northline Mall, Houston, Texas, facility now contain, or have they within the last two years contained, any application filled out in red ink or pencil?
d. If the answer to 'c' is 'yes,' why were they filled out in red?
"7. Respondent Texas State Optical is to make available to a representative of the Equal Employment Opportunity Commission its records of patients' applications for service at its 306 Northline Mall, Houston, Texas, facility for purposes of inspection."

could "create an atmosphere that would adversely affect the terms and conditions of her employment" and thus have an effect that is proscribed by Title VII. The Court is not impressed by that argument.

[4] The Commission is created by Title VII for the purpose of enforcing the prohibitions contained in that title. Section 706(a) sets out procedure for enforcement,

> "Whenever it is charged in writing under oath by a person claiming to be aggrieved * * * that an employer * * * has engaged in an unlawful employment practice * * *. * *"

"Unlawful employment practice" is defined by §703.[2] Briefly summarized, the charges which the Commission is authorized to investigate comprehend discriminatory hiring practices or classification of employees in such a manner as adversely to affect their status because of race or ethnic origin. Accepting *arguendo* the Commission's contention that if Petitioners in fact "segregated the patients" then such a practice might be so offensive to Mrs. Chavez's sensibilities as to make her uncomfortable in her job, there still is no showing that she is "aggrieved"

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2. Section 703 reads, in pertinent part:
"(a) It shall be unlawful for an employer—
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

in the sense contemplated by §706(a), i.e., by the employer's pursuit of an "unlawful employment practice" within §703.

Discrimination on the basis of race or ethnic origin directed against patrons of certain places of public accommodation is contrary to public policy and has been proscribed by the Congress in the Civil Rights Act of 1964. Provisions respecting these matters and procedure for enforcement of the prohibitions and for redress by persons aggrieved are contained in Title II of that Act, 42 U.S.C. § 2000a *et seq.* Title VII does not address itself to Petitioners' accommodation of their patients or patrons, and the matter is of no concern to the Commission.

Neither is Mrs. Chavez in a position to assert the legal rights of others who might patronize Texas State Optical. The cases relied upon by the Commission are not in point. Jenkins v. United Gas Corp., 400 F.2d 29 (5th Cir. 1968), involved a suit by a Negro employee to enjoin alleged violations of Title VII by his employer. The Court of Appeals held that the action could be deemed "a sort of class action" on behalf of fellow employees similarly situated. N.L.R.B. v. Tanner Motor Livery, Ltd., 349 F.2d 1 (9th Cir. 1965), arose in the context of a labor dispute under § 7 of the National Labor Relations Act, 29 U.S.C. § 157, which guarantees to employees the right to engage in concerted activities for the purpose of mutual aid or protection. In that case the employees were seeking a determination by the National Labor Relations Board as to whether presenting a request or picketing by employees in support of nondiscriminatory hiring by their employer was protected activity under § 7. The Court of

Appeals held that the Board had correctly determined that such activities are protected by the statute. The Commission's contention in the case at bar that an employee can claim the protection of Title VII because of the employer's discrimination against his customers is a wholly different proposition and one unsupported by authority. We reject it.

We must emphasize the failure of Mrs. Chavez's complaint in this regard to show that she is aggrieved in a manner contemplated by Title VII. As it has been explained to the Court, Mrs. Chavez claims that Petitioners afford their patients different treatment according to their ethnic origins. It is not alleged that, for instance, Mrs. Chavez is required or permitted to attend only to patients of a certain ethnic origin and not to others. Such a complaint might indicate a classification of employees such as is prohibited by § 703. That is not our case. Mrs. Chavez claims only that she is offended by the manner in which her former employers treated their customers.

[5, 6] Business records are not always privileged and may be subject to inspection by governmental agencies charged with administration and enforcement of a valid regulatory statute. However, such records are nonetheless private property, and due process requires at least a satisfactory showing that the matters sought to be produced are reasonably material to some subject within the legitimate scope of an administrative inquiry. It is always open to the employer to object to a demand on grounds of relevancy or overbreadth, and it is incumbent upon the Commission to show the Court that it is entitled to a compliance order. See Overnite Transportation Co. v. E.E.O.C., 397 F.2d 368 (5th Cir. 1968). No such show-

ing has been made by the Commission in this case. Accordingly we grant Petitioners' request for an order modifying the demand by striking therefrom the items numbered 6 and 7. The Commission's cross petition for an order of compliance is denied insofar as those items are concerned. With respect to the other items of the demand, Petitioners are required to exercise good faith and to supply information desired by the Commission insofar as it exists. See Georgia Power Co. v. E.E.O.C., 295 F.Supp. 950 (N.D. Ga. 1968), aff'd 412 F.2d 462 (5th Cir. 1969).

It is so ordered.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
For the Fifth Circuit

NO. 30,651

DR. N. JAY ROGERS, ET AL,
Petitioners-Appellees,

versus

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Respondent-Appellant*

Appeal from the United States District Court for the Eastern District of Texas

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(December 21, 1971)

Before GOLDBERG, GODBOLD, and RONEY
Circuit Judges.

GOLDBERG, Circuit Judge: This Equal Employment Opportunity case comes to us in a preliminary and undefinitive posture. We are asked to limit at the threshold the investigative scope of the Equal Employment Opportunity Commission on the ground that the Commission seeks evidence of a discriminatory employment practice which is not proscribed by Title VII of the Civil Rights

Act of 1964.[1] Judge Godbold, for reasons best expressed in his concurring opinion, permits the discovery. Though my justiciable interpretation of the acts charged differs from that of my Brother Godbold, I also sanction the discovery, because at this juncture I cannot be certain that the acts charged are not within the Act's proscriptions.

On April 11, 1969, Mrs. Josephine Chavez filed with the respondent EEOC, pursuant to Section 706(a) of Title VII, 42 U.S.C.A. § 2000e-5(a), a verified charge of employment discrimination against petitioners S. J. and N. Jay Rogers, who are optometrists doing business as "Texas State Optical." The charge stated in full:

> "The above company has discriminated against me because of my national origin Spanish surnamed American by:
>
> a. Terminated me from my job without a reason. I I was the only Spanish surnamed American employed with seven Caucasian females who abused me. The manager told me my work was allright [sic] but he had to let me go because of friction.
>
> b. segregating the patients."

In May of 1969 the Commission commenced investigation of the charge, serving a copy of it on petitioners. Frustrated by unsuccessful efforts to secure voluntary production of materials considered relevant to its investigation, the Commission invoked its statutory authority and issued

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1. 42 U.S.C.A. §§2000e-2000e-15 (1964).

upon the petitioners a Demand for Access to Evidence.[2] In addition to information concerning Mrs. Chavez and other of the petitioners' employees, the Demand sought production of data pertaining to or contained in the patient applications which petitioners maintain in the course of their business. Within the twenty-day statutory period,[3] petitioners filed in a federal district court a petition to set aside or modify the Demand, and the EEOC timely answered and cross-petitioned for enforcement. The district court granted partial enforcement of the Demand, denying the Commission's request for access to patient applications. *Rogers v. EEOC*, E.D. Tex. 1970, 316 F. Supp. 422. The EEOC appeals the partial enforcement order[4]

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2. 42 U.S.C.A. §2000e-8(a) provides:
"In connection with any investigation of a charge filed under section 2000e-5 of this title, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this sub-chapter and is relevant to the charge under investigation."

3. 42 U.S.C.A. §2000-9(c) provides in pertinent part:
"Within twenty days after the service upon any person charged under section 2000e-5 of this title of a demand by the Commission for the production of documentary evidence or for permission to examine or to copy evidence in conformity with the provisions of section 2000e-8(a) of this title, such person may file in the district court of the United States for the judicial district in which he resides, is found, or transacts business, and serve upon the Commission a petition for an order of such court modifying or setting aside such demand. . . ."

4. The district court's order modifying the Demand is a final, appealable order under 28 U.S.C.A. §1291. Overnite Transportation Co. v. EEOC, 5 Cir. 1968, 397 F.2d 368, 369 n.4; International Brotherhood of Electrical Workers, Local No. 5 v. EEOC, 3 Cir. 1968, 398 F.2d 248, cert. denied, 1969, 393 U.S. 1021. See also General Employment Enterprises, Inc. v. EEOC, 7 Cir. 1971, 440 F.2d 783; Graniteville Co. v. EEOC, 4 Cir. 1971, 438 F.2d 32; Bowaters Southern Paper Corp. v. EEOC, 6 Cir. 1970, 428 F.2d 799, cert. denied, 1970, 400 U.S. 942.

and contends that the district court should have granted the Commission access to these applications. The majority of this court is in agreement that the Demand for Access to Evidence against petitioners should be enforced in toto.

Before considering the district court's justifications for refusing enforcement of the Demand, I find it necessary to consider the interpretation which should be accorded Mrs. Chavez's complaint. Neither the district court nor the EEOC interpreted the complainant's charge of "segregating the patients" as alleging that "Mrs. Chavez is required or permitted to attend only to patients of a certain ethnic origin and not to others." *Rogers v. EEOC*, supra, 316 F. Supp. at 425. Such an interpretation, which Judge Godbold endorses, might very well be reasonable, but it is certainly neither compulsory nor compelling. This case was tried and the trial court's conclusion reached solely on the interpretation of the charge that petitioners discriminate among their clients on the basis of the patient's national origin. This is both a reasonable and a practical interpretation, and I prefer to come to grips with the fundamentals of this case as viewed by the claimant, the learned and distinguished trial judge, the Equal Employment Opportunity Commission, the briefs on appeal, and Judge Roney. Accordingly, for purposes of the merits of this appeal, I will treat the latter portion of Mrs. Chavez's charge, as the district court did, to mean only that petitioners afford their patients different treatment depending on their ethnic origins.

I. *Unlawful Employment Practice*

On the basis of the above interpretation of the second portion of Mrs. Chavez's charge, the court below denied the Commission's Demand for access to the petitioners'

patient applications because the EEOC had failed to show that Mrs. Chavez was a person "aggrieved" by an unlawful employment practice within the meaning of Section 703(a), 42 U.S.C.A. §2000e-2(a). In the words of the trial court:

> . . . Accepting *arguendo* the Commission's contention that if Petitioners in fact 'segregated the patients' then such a practice might be so offensive to Mrs. Chavez's sensibilities as to make her uncomfortable in her job, there still is no showing that she is 'aggrieved' in the sense contemplated by § 706(a), i.e., by the employer's pursuit of an 'unlawful employment practice' within § 703." *Rogers v. EEOC, supra,* 316 F.Supp. at 425.

I disagree fundamentally with this position. While the district court may have viewed lightly the connection between the petitioners' alleged discrimination against its patients and Mrs. Chavez's sensibilities, I think that the relationship between an employee and his working environment is of such significance as to be entitled to statutory protection.

Section 703(a)(1) of Title VII, 42 U.S.C.A. § 2000e-2(a)(1) provides that it shall be an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." This language evinces a Congressional intention to define discrimination in the broadest possible terms. Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of

such nefarious activities. Rather, it pursued the path of wisdom by being unconstrictive, knowing that constant change is the order of our day and that the seemingly reasonable practices of the present can easily become the injustices of the morrow. Time was when employment discrimination tended to be viewed as a series of isolated and distinguishable events, manifesting itself, for example, in an employer's practices of hiring, firing, and promoting. But today employment discrimination is a far more complex and pervasive phenomenon, as the nuances and subtleties of discriminatory employment practices are no longer confined to bread and butter issues. As wages and hours of employment take subordinate roles in management-labor relationships, the modern employee makes ever-increasing demands in the nature of intangible fringe benefits. Recognizing the importance of these benefits, we should neither ignore their need for protection, nor blind ourselves to their potential misuse.

We must be acutely conscious of the fact that Title VII of the Civil Rights Act of 1964 should be accorded a liberal interpretation in order to effectuate the purpose of Congress to eliminate the inconvenience, unfairness, and humiliation of ethnic discrimination. *Pharham v. Southwestern Bell Telephone Co.*, 8 Cir. 1970, 433 F.2d 421; *Green v. McDonnell-Douglas Corp.*, E.D. Mo. 1970, 318 F.Supp. 846; *United States v. Medical Soc'y of South Carolina*, D.S.C. 1969, 298 F.Supp. 145. Furthermore, I regard this broad-gauged, innovation legislation as a charter of principles which are to be elucidated and explicated by experience, time, and expertise. Therefore, it is my belief that employees' psychological as well as economic fringes are statutorily entitled to protection from employer abuse, and that the phrase "terms, conditions,

and privileges of employment" in Section 703 is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination. I do not wish to be interpreted as holding that an employer's mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee falls within the proscription of Section 703. But by the same token I am simply not willing to hold that a discriminatory atmosphere could under no set of circumstances ever constitute an unlawful employment practice. One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers, and I think Section 703 of Title VII was aimed at the eradication of such noxious practices.

Petitioners urge, nevertheless, that the second portion of Mrs. Chavez's charge could not relate to an unlawful employment practice because it alleges discrimination directed toward petitioners' patients and not toward any employee. Essentially petitioners' contention is that their discriminatory treatment or classification of patients is not a practice directed toward any employee and that because of such discrimination Mrs. Chavez cannot complain that she is treated any differently than any other employee. However, petitioners' eisegesis is not consistent with the interpretation recently accorded Title VII by the Supreme Court. In *Griggs v. Duke Power Co.*, 1971, ____ U.S.____, ____S.Ct.____, 28 L.Ed.2d 158, the Court held that the absence of discriminatory intent by an employer does not redeem an otherwise unlawful employment practice, and that the thrust of Title VII's proscriptions is aimed at the consequences or effects of an employment

practice and not at the employer's motivation. Hence, petitioners' failure to direct intentionally any discriminatory treatment toward Mrs. Chavez is simply not material to the finding of an unlawful employment practice. Moreover, I believe that petitioners' argument does not countenance the distinct possibility that an employer's patient discrimination may constitute a subtle scheme designed to create a working environment imbued with discrimination and directed ultimately at minority group employees. As patently discriminatory practices become outlawed, those employers bent on pursuing a general policy declared illegal by Congressional mandate will undoubtedly devise more sophisticated methods to perpetuate discrimination among employees. The petitioners' alleged patient discrimination may very well be just such a sophisticated method and, if so, then Mrs. Chavez, as the primary object of the discriminatory treatment, suffers directly the consequences of such a practice and is entitled to protection in accordance with the provisions of Title VII.

II. *Sufficiency of the Charge*

Even though I would hold that a working environment heavily charged with discrimination may constitute an unlawful employment practice, I must nevertheless resolve whether or not Mrs. Chavez's charge of "segregating the patients" is sufficient to trigger the Commission's investigatory functions. I am met at the outset with scant legislative guidance. The relevant portion of Section 706(a) of Title VII, 42 U.S.C.A. § 2000e-5(a) provides:

> "Whenever it is charged in writing under oath by a person claiming to be aggrieved, . . . (and such charge sets forth the facts upon which it is based) that an employer . . . has engaged in an unlawful

> employment practice, the Commission shall . . . make an investigation of such charge. . . ."

In relation to substantive matters, Section 706(a) seemingly requires that the charge (1) set forth the facts upon which it is based, and (2) allege an unlawful employment practice.

Concerning the proper criterion to be applied in determining whether or not a charge is factually sufficient and comports with the requirements of the parenthetical clause of Section 706(a), I believe that the Fourth Circuit has adopted a standard which is both consistent with the underlying policy of Title VII and promotive of the purposes and objectives embodied in its enforcement provisions. In *Graniteville Co. v. EEOC*, 4 Cir. 1971, 438 F.2d 32, 38, that court stated:

> "The purpose of the charge under section 706 is only to initiate the EEOC investigation, not to state sufficient facts to make out a prima facie case. The parenthetical clause in section 706(a) only requires a sufficient allegation to give the EEOC notice of what it is to investigate and put the respondent on notice of the practice or violation with which it is charged.
>
> "The scope of prohibited practices under Title VII is broad. The section 706(a) requirement that charges state the facts on which they are based must accordingly be given a flexible interpretation as applied to allegations of different unlawful employment practices. If a charging party is alleging a specific incident as a violation of Title VII, such as denial of a requested promotion or the termination of his employment, it may be appropriate to require some degree of specificity of the charge's allegations. However, sophisticated general policies and practices of discrimination are not susceptible to such precise de-

lineation by a layman who is in no position to carry out a full-fledged investigation himself. . . ."

Applying this standard to the instant case, I believe that the complainant's charge of "segregating the patients" constitutes a sufficient factual allegation to inform the EEOC of what it is to investigate and to notify the employer of the practice with which it is charged. I am not unmindful of the fact that Mrs. Chavez might have detailed the specific act or acts of segregation of which she complains. However, the involution and obscurity of the possible unlawful employment practice in this case demand that a flexible interpretation be accorded to this requirement and that a court accept as sufficient a generalized factual allegation which in connection with an elemental or common unfair employment practice might otherwise be rejected as imprecise.

Turning to the sufficiency of the charge in relation to the second requirement, that of an allegation of an unlawful employment practice, I note that a problem exists because of the indefiniteness of Mrs. Chavez's charge. Assuming that the underlying facts show that petitioners are in some manner segregating their patients, then the particular act or acts of segregation may or may not constitute an unlawful employment practice. However, I do not view certainty of violation as a condition precedent to EEOC investigation. A charging party's failure to allege facts which, if true, would conclusively show a violation of Title VII should not be fatal to the effectiveness of the charge. Rather, I think that a charge is sufficient to initiate EEOC proceedings if its factual allegations could reasonably encompass, upon a full investigation, an unlawful employment practice. In the instant case the petitioners' patient segregation could be so em-

ployee demeaning as to constitute an invidious condition of employment, and the Commission should have the right to investigate and employ its expertise in determining whether or not the facts in the particular enterprise give rise to an unlawful employment practice. Thus, the *possibility* that petitioners' segregation of its patients could encompass an unlawful employment practice justifies an EEOC investigation. I believe that this conclusion is consistent with the general interpretative treatment that has been given to the enforcement provisions of Title VII by the federal judiciary.

In those cases in which a liberal construction has been given to various procedural provisions of Title VII's enforcement process, the courts have founded their liberality on a number of practical considerations. First, courts have recognized that these enforcement provisions were fabricated as lay-initiated proceedings, intended to be utilized by the most unlettered and unsophisticated employees. *Sanchez v. Standard Brands, Inc.*, 5 Cir. 1970, 431 F.2d 455; *King v. Georgia Power Co.*, N.D. Ga. 1968, 295 F.Supp. 943. Furthermore, federal decisions have noted that complainants are often unaware of "the full panoply of discrimination which [they] may have suffered" and frequently are "ignorant of or unable to thoroughly describe the discriminatory practices to which they are subjected." *King v. Georgia Power Co., supra*, 295 F.Supp. at 947. *See Sanchez v. Standard Brands, Inc., supra*, 431 F.2d at 466. This is particularly true where the discrimination is embodied in a highly complex and abstruse practice. *See Graniteville Co. v. EEOC, supra*. Finally, it has been recognized that a charge of discrimination initiates only an administrative fact-finding procedure in the context of a nonadversary investigation in which the Com-

mission simply attempts to determine whether reasonable cause exists to believe that the charge is true. *General Employment Enterprises, Inc. v. EEOC*, 7 Cir. 1971, 440 F.2d 783; *Graniteville Co. v. EEOC, supra; Sanchez v. Standard Brands, Inc., supra.*

These considerations lead me to conclude that the Commission must be permitted to view a complainant's charge in its broadest reasonable sense. Since the factual allegations of Mrs. Chavez's charge could reasonably encompass an unlawful employment practice, the Commission should be empowered to ascertain the factual contours of the alleged patient discrimination and to make its determination as to existence of "reasonable cause." I emphasize that I do not conclude that patient discrimination is a per se violation of Title VII. Nor do I hold that the burden of demonstrating that patient segregation, if existent, is such a malefic condition of employment as to constitute a statutory interdiction is a gossamer one. I simply conclude that the Commission possesses the statutory authority to investigate psychological fringes in an employment relationship and to come to a conclusion as to whether or not in the particular case, such activities are within the curative cupola of the Act. Therefore, assuming that patient segregation be found to exist, I leave to another day a judicial evaluation of its effect on the employment conditions of the company's employees.

Based upon the foregoing discussion, it follows that the Commission should be granted access to information concerning the petitioners' patient applications. Therefore, the judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED and REMANDED.

GODBOLD, Circuit Judge, specially concurring:

I concur with Judge Goldberg in the result that the District Court must allow access by EEOC to items 6 and 7 of the Demand for Access to Evidence. My concurrence is restricted to that result.

I accept a construction of Mrs. Chavez's charge which EEOC has urged upon this court as an alternative to the construction preferred (and accepted as being within the statute) by Judge Goldberg, and preferred (but considered as outside the statute) by Judge Roney. It is that Mrs. Chavez's charge could be considered as describing discrimination practiced against her in that she, because of her ethnic status as a Spanish surnamed American, was permitted or required by her employers to attend or to have contact with only segregated patients, and that this would be an unlawful employment practice under subsections (a)(1) and (2). EEOC's brief (p. 19) says this:

> The instant charge may also be interpreted as alleging that Rogers' minority group employees are not permitted to have contact with Anglo-Saxon patients. This clearly constitutes an unlawful term or condition of employment which the Commission has authority to investigate, one which could not be justified under any set of facts, even if Rogers were to claim that the assignment of employees was the result of customer preference.

I agree with EEOC that this is a possible and rational construction. Thus read, and independently of the assertion of discriminatory discharge, the claim refers to unlawful employment practices consisting, under § 2000e-2(a)(1), of diserimination against Mrs. Chavez because of her race, color (etc.), and, under § 2000e-2(a)(2), of classification of her because of her race, color (etc.).

On this appeal EEOC has given primary emphasis to the construction that the charge of employer segregation of patients (or clients), even if such a practice vis-a-vis the patients (or clients) themselves is not otherwise forbidden by law, is a charge that there exists a policy which so "infects the total environment" of employment that it constitutes an unlawful employment practice against any employee who works in that environment. This interpretation was given primary, if not sole, emphasis by EEOC in the District Court. The District Judge adopted it and, considering the charge as so construed, rejected the charge as a basis for access to items 6 and 7.

The hearing before District Judge Fisher consisted only of discussion with counsel, including that for EEOC. At that level EEOC eschewed the construction which it now asserts on appeal as an alternative meaning.

> We must emphasize the failure of Mrs. Chavez's complaint in this regard to show that she is aggrieved in a manner contemplated by Title VII. As it has been explained to the Court, Mrs. Chavez claims that Petitioners afford their patients different treatment according to their ethnic origins. It is not alleged that, for instance, Mrs. Chavez is required or permitted to attend only to patients of a certain ethnic origin and not to others. Such a complaint might indicate a classification of employees such as is prohibited by § 703. That is not our case. Mrs. Chavez claims only that she is offended by the manner in which her former employers treated their customers.

Rogers v. EEOC, 316 F. Supp. 422, 425 (E.D. Texas, 1970). Thus, it appears to me that the District Judge understood that there was presented to him for considera-

tion a construction of the claim which would embrace a broad and important extension of what previously had been judicially considered to be within the statute, an extension which he rejected, and that there was excluded from his consideration a possible narrower construction which he recognized might well be within the statute. His understanding came not from evidence or from statements made to him by Mrs. Chavez but from explanations given to him by EEOC of what it was that Mrs. Chavez was claiming. Now, at the appellate level, the narrower construction is asserted by EEOC as an alternative construction on the basis of which it should obtain the discovery it desires. This shifting position, as I point out below, is one of the reasons why I would grant relief only on the narrower ground.

I adopt EEOC's alternative construction for several reasons. It falls within the liberal principles of construction which we apply to lay-drawn charges filed with EEOC, often written by persons not well educated and usually by persons unschooled in the niceties of legal draftsmanship. *Parliament House Motor Hotel v. EEOC*, 444 F.2d 1335 (5th Cir., 1971); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970); *Jenkins v. United Gas Co.*, 400 F.2d 28 (5th Cir. 1968). The charge need only "give sufficient information to enable the EEOC to see what the grievance is all about." *Parliament House, supra*, at 1339-40, quoting from *Jenkins v. United Gas, supra*. We know from the charge that Mrs. Chavez complained, inter alia, that: "The above company has discriminated against me because of my national origin Spanish surnamed American by . . . segregating the patients."

The construction which I adopt falls within well established boundaries of the statute—it is in terms of dis-

crimination *against* Mrs. Chavez because of *"such individual's"* race, national origin, etc., 42 USC § 2000e-2(a)(1), or is a limitation, segregation or classification of *Mrs. Chavez,* adversely affecting her status as an employee, because of *"such individual's"* race, national origin, etc., 42 USC § 2000e-2(a).(2). With the "charge under investigation" given the construction which I accept, it is one made "by a person claiming to be aggrieved," 42 USC § 2000e-5, and items 6 and 7 meet the requirements of relevance and materiality to the charge. This strikes me as a much sounder judicial approach than construing the charge as asserting a type of discrimination indirect and collateral, pursuant to which Mrs. Chavez was offended by segregation practices directed against others who are of another ethnic group, and who are not employees, and directed at such others because of their race, national origin, etc.

The rule of liberal construction of lay-drawn charges prevents technicalities from closing the courthouse door to the unsophisticated. The purpose of the rule is fully vindicated by resting decision on a single allowable interpretation of the charge. Also, just as any other litigant, the agencies of the government should be encouraged, or even required, to advance at the earliest possible stage the contentions which they propose to make. Whether in this case the course of events has been ingenious or ingenuous, we have been presented at the appellate level with a problem consuming many hours of judicial labor, producing three differing views and no opinion of the court, concerning a question of discovery arising from an administrative proceeding where facility should be a watchword, and all in an appeal that possibly might have been avoided. Not only is it unnecessary for us to reach

the primary construction asserted by EEOC, but in the circumstances of this case as a matter of judicial administration of our own affairs, it is inappropriate that we do so.

RONEY, Circuit Judge, dissenting:

The primary issue on this appeal is whether the three words "segregating the patients," and nothing more, except that the claimant is a Spanish Surnamed American, allege an unfair employment practice against Mrs. Josephine Chavez under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq. In the investigation of a charge filed by Mrs. Chavez, the Equal Employment Opportunity Commission seeks information and records concerning applications of patients for service.[1] The obvious thrust of the Commission's investigation is to determine whether the records show that Negro patients are treated differently from others.[2] The employer Texas State

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1. No argument has been made that the segregation of patients is illegal under either state or federal law.

2. "6. A written response to the following questions:
   "a. Does Texas State Optical instruct its employees at any of its Houston facilities to fill in Negro patients' applications for service with red ink or red pencil and to use black or blue ink or pencil for patients other than Negroes.
   "b. Has Texas State Optical ever so instructed its employees at any Houston facility or elsewhere?
   "c. Do Texas State Optical records of patients for service at its 306 Northline Mall, Houston, Texas, facility now contain, or have they within the last two years contained, any application filled out in red ink or pencil?
   "d. If the answer to "c" is "yes," why were they filled out in red?

"7. Respondent Texas State Optical is to make available to a representative of the Equal Employment Opportunity Commission its records of patients' applications for service at its 306 Northline Mall, Houston, Texas, facility for purposes of inspection."

Optical, objects to this line of investigation. Before EEOC is entitled to information which would show whether or not Texas State Optical segregated its patients according to race, it must be demonstrated that the evidence "relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation."[3] We are not faced with broad questions concerning the legality, morality or propriety of customer discrimination, but the narrow decision as to whether the employer is required by this statute to reveal this information to the EEOC.

The first question then is, "What charge is under investigation?" The second question is whether that charge is an unlawful employment practice covered by this subchapter of the Act. The third question is whether the evidence is relevant to the charge.

It is suggested that the three words "segregating the patients" may be interpreted to constitute a charge that the claimant, because of her national origin as a Spanish Surnamed American, was permitted to have contact with patients of one ethnic or racial group only. It is not argued that such a charge is not covered by the Act. The records would obviously be relevant to such a charge. So this point turns on the threshold question of whether this charge has actually been made and is under investigation. This interpretation was only suggested, not argued, in the court below and on this appeal. It seems clear

3. 42 U.S.C. 2000e-8(a). "In connection with any investigation of a charge filed under section 2000e-5 of this title, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation."

that the district court was correct in holding that the words "segregating the patients" did not, and were not intended to, constitute an allegation that Mrs. Chavez was permitted to have contact with only one group of patients.

In the first place, there is not the slightest indication in the entire record before us that Mrs. Chavez had any contact with the patients at all. In the second place, these words would not be key words to such a charge. If Mrs. Chavez were permitted contact with only one class of patients, the issue as to unfair employment practice would not turn on whether the patients were segregated. Segregation of patients would not be a necessary element to such a charge. These are not key words, the mere mention of which gives notice of the allegation of a well-known kind of discrimination. In the third place, it would seem easy enough for Mrs. Chavez to give some clearer indication that she was discriminated against in this manner, if such were the case. Mrs. Chavez knows better than anyone whether she had contact with patients of but one ethnic group, if that be her complaint. It does not seem to violate any reasonable approach to the informal procedures involved for the EEOC to find out at least that fact from Mrs. Chavez before it launches into an investigation of whether such practice discriminated against her because of her national origin. This court has recognized the authority of the EEOC to amend and amplify a charge by having the charging party set forth her allegations in greater detail. *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970). The fact that it did not obtain clarification and thus avoid this protracted litigation bolsters a decision that such a charge was not "under investigation" by the EEOC.

The main difficulty with granting the EEOC access to the records on this interpretation of the charge seems to be simply that it gives access to records which relate to a charge that apparently neither Mrs. Chavez nor the EEOC is making.

On essentially this same objection I would dispose of the argument that the records of patient discrimination would be relevant evidence to the charge that the firing of Mrs. Chavez was ethnically motivated. Although this charge was clearly made in the first part of her complaint, it seems to have nothing to do with the records sought by the EEOC in this investigation.[4] First, the Spanish Surnamed American, and the EEOC seeks records to show discrimination against Negroes. Second, her statement about being fired because of friction with Caucasian females reasonably negates the relevance of the records to the problem involved. Third, the cases cited by EEOC merely indicate that evidence of other employment discrimination may be relevant to a particular charge of discrimination.[5] Such cases are not concerned with customer records. Fourth, and this is perhaps the most persuasive reason for sustaining the district court, the point was not argued below and seems to be asserted here to

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4. "The above company has discriminated against me because of my national origin Spanish Surnamed American by:
   a. Terminated me from my job without a reason. I was the only Spanish Surnamed American employed with seven Caucasian females who abused me. The manager told me my work was allright but he had to let me go because of friction.
   b. segregating the patients.".

5. *Blue Bell Boots, Inc. v. EEOC*, 418 F.2d 355 (6th Cir. 1969); *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970); *United States v. Dillon Supply Co.*, 429 F.2d 809, 804 (4th Cir. 1970); *Jenkins v. United Gas Corp.*, 400 F.2d 28 (5th Cir. 1968).

try to justify a request for the records for actual use in the investigation of an entirely different kind of complaint.

In the way this case has been presented, it is quite obvious that the EEOC wants the records for the purpose of investigating the charge that the segregation of patients was an unfair employment practice against minority group employees under Title VII. The case should be dealt with on that basis.

There is serious doubt as to whether the mere words "segregating the patients" are adequate to state an unfair employment charge sufficient to meet the most meager requirements of due process. These words do not necessarily relate to employment at all, and could mean so many things that, standing alone, they cannot be said to charge any particular employment discrimination. In each of the cases cited to us by the EEOC, the charge contained words relating to hiring, firing and promoting of employees with at least some conclusionary suggestion that there was discrimination in one of these areas because of the race, color, religion, sex, or national origin of the employees.[6] Even though we are committed to a policy that requires little in the way of stating a charge,[7] where, as here, the

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6. All of the cases cited to us contain charges relating to hiring, firing or promotion of employees: *General Employment Enterprises, Inc. v. EEOC*, 440 F.2d 783 (7th Cir. 1971); *Graniteville Company, (Sibley Division) v. EEOC*, 438 F.2d 32 (4th Cir. 1971); *Local No. 104, Sheet Metal Workers International Assoc., AFL-CIO v. EEOC*, 439 F.2d 237 (9th Cir. 1971); *Georgia Power Co. v. EEOC*, 412 F. 2d 462 (5th Cir. 1969); *Blue Bell Boots, Inc. v. EEOC, supra; Jenkins v. United Gas Corp., supra; Sanchez v. Standard Brands, Inc., supra;* and *Parliament House Motor Hotel v. EEOC*, 444 F.2d 1335 (5th Cir. 1971).

7. *Parliament House Motor Hotel v. EEOC, supra.*

words in the charge do not on their face speak to employment practices, the claimant should at least be required to indicate how the facts alleged relate to her employment, and how it can reasonably be inferred that she has been discriminated against because of her national origin.

However, by permitting the words to be embellished by the argument of the EEOC as to the charge that it says it is investigating, we get to the question of whether such a charge is included within the ambit of unlawful employment practices proscribed by Congress in Title VII. We must decide whether there is any legal basis for a claim that an employer's discriminatory practices against patients can constitute an unlawful employment practice against a minority group employee under this statute. The question of whether or not the relationship between an employee and his working environment is of such significance that it ought to be cloaked with statutory protection as an employment practice is a question for Congress, not for the EEOC, and not for us. The question we must answer is whether Title VII, as written, does give that relationship statutory protection. Not whether it could or should —but whether it does.

The answer to this question must come from the following provision of the statute:

§ 2000e-2, Unlawful employment practices—
Employer practices

(a) It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any undivid-

ual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual, of employment opportunities or otherwise adversely affect his claim as an employee, because of such individual's race, color, religion, sex, or national origin.

There is nothing here to indicate that Congress intended by this subchapter to deal with any general condition of employment applicable to all employees regardless of their race, color, religion, sex, or national origin. The section is restricted to employment practices and does not encompass general business practices. The claimant must be the object of some special discriminatory practice which operates against her opportunities of employment because of her race, color, religion, sex, or national origin. These are all clearly discernible; objective employee characteristics, which an employer can readily ascertain. The Act does not include in this list any reference to the emotional and psychological make-up of an individual employee. No race, color, religion, sex, or national origin carries with it a monopoly on sensitivity to an employer's discrimination against customers. Once the employment practices are such that the oppotunities for employment in a business are not unequal because of an individual's race, color, religion, sex, or national origin, this particular subchapter has done its job. The Act does not proscribe business practices which result in unequal employment opportunities because of personal, emotional or psychological characteristics that might be common to various employees regardless of their race, color, religion, sex, or na-

tional origin. There is no indication in the Act or the legislative history that Congress in passing Title VII was concerned about whether an employer's business presents conditions for employment that are environmentally attractive to all, whether the manner of his operation suits everyone, or whether a particular individual might be uncomfortable or have feelings of unhappiness in his employment. The merit of this kind of approach is not up for decision. Congress has simply not given this scope to its legislation.

Any construction of Title VII that permits discriminatory conditions in customer service to constitute an unfair employment practice would make the Civil Rights Act of 1964 internally inconsistent. For example, Title II of the Act deals with customer discrimination in public accommodations, providing that the subchapter does not apply to certain establishments. 42 U.S.C. §2000a(e). However, under the construction suggested here customer discrimination in any of those excluded establishments could become an unfair employment practice which would permit the employee to bring suit to end the discrimination. 42 U.S.C. §2000e-5. It is not reasonable to assume that Congress intended to exclude certain establishments from the direct prohibition against customer segregation under one section of the statute, only to have them included in another section which indirectly proscribes such a practice. Finding discrimination in customer service which is offensive to employees to constitute an unfair employment practice would permit the EEOC to investigate and conciliate matters in the customer service area of public accommodations. This also would present a conflict within the Civil Rights Act since the Community Relations Service is charged with seeking voluntary compliance under the pub-

lic accommodations subchapter. 42 U.S.C. §2000a-3(d). Where such inconsistencies have not been clearly created by Congress, they should not be unnecessarily created by judicial decision.

The EEOC argues that an employee "who claims to be aggrieved by an alleged unlawful practice need not be the direct victim of such practice." Insofar as being helpful in the decision of this case, the argument overlooks two points: first, the unlawful practice alleged must be an unlawful *employment* practice, if the claim is made under Title VII. There must be a determination that there is an employment practice involved before we get to the question of who is aggrieved thereby. Certainly this statute was not intended to encompass every unlawful practice that an employer might engage in. Second, even if Title VII were stretched to include a business practice which is not an employment practice, the employer in this case argues, while denying that it segregates patients, that it is not covered by any law directly prohibiting such segregation. The EEOC cites no authority to the contrary. This makes inapplicable the cases relied upon by EEOC in which a union files a discrimination suit for unlawful employment practices,[8] an applicant for employment challenges employment practices which affect only incumbent employees,[9] persons of one national origin complain of employment practices affecting persons of another race or na-

8. *International Chemical Workers Union v. Planters Mfg. Co.*, 259 F.Supp. 365, 368 (N.D. Miss. 1966); *Local 186, International Pulp, Sulphite and Paper Mill Workers v. Minnesota Mining & Mfg. Co.*, 304 F.Supp. 1284 (N.D. Ind. 1969).

9. *Carr v. Conoco Plastics, Inc.*, 423 F.2d 57 (5th Cir. 1970), affirming 295 F.Supp. 1281, 1289 (N.D. Miss. 1969); *Johnson v. Georgia Highway Express Co.*, 417 F.2d 1122 (5th Cir. 1969).

tional origin,[10] or an employee in one plant complains of employment discrimination in another plant.[11] Equally inapplicable are the cases in which a patient has been allowed to challenge unlawful employment practices in a hospital,[12] or which concern the standing of certain individuals to challenge a discriminatory school system.[13]

In all of these cases the discrimination complained of was unlawful and it was a question of who could complain. This line of authority is not helpful in determining the fundamental question of whether the employer is engaged in an unlawful employment practice.

The notion that customer segregation might be utilized as a subtle scheme to purposely discriminate against minority group employees presumes that were it not for the employers bent on perpetrating discrimination among employees, it would not engage in customer segregation. Under this argument the reason that Texas State Optical segregates patients is to discriminate against Mrs. Chavez. If it were not for its desire to discriminate against Mrs. Chavez, it would not segregate its patients. Even if such a situation could raise customer segregation into the realm of an employment practice, the argument is so contrary to human nature and the real-life world of discrimination that it furnishes an unreliable base for judicial decision. Certainly it is unrealistice enough to at least require a

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10. *Sanchez v. Standard Brands, Inc., supra.*

11. *Jenkins v. United Gas Corp., supra,* at p. 31, fn. 5.

12. *Marable v. Alabama Mental Health Board,* 297 F.Supp. 291, 297 (M.D. Ala. 1969); see also *Cypress v. Newport News General & Nonsectarian Hospital,* 375 F.2d 648, 653 (4th Cir. 1967).

13. *United States v. Montgomery County Board of Education,* 395 U.S. 225, 231-232, 89 S.Ct. 1670, 1674 (1969).

specific charge that this was done before an employer should have to respond to an investigation.

It is pertinent to note that there are disadvantages to wide-ranging investigation by the EEOC.

> ". . . While a respondent might be cooperative in complying with the EEOC's narrowly focused informational demands, he might, if made the subject of a "wholesale fishing expedition," become intractable. In addition, if the EEOC broadens its investigations to the limit of a liberal discovery standard in its zeal to vindicate the public interest in ferreting out all discrimination, the private interest of the complainant may suffer for it. The resolution of his specific complaint may be needlessly delayed.[140] Thus, although there are persuasive arguments for giving the EEOC sweeping investigatory power, there are counter-vailing considerations which should lead the Commission to be careful in exercising its discretion."
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> Developments in the Law, *Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv.L.Rev. 1109, 1218 (1971).

This perception was especially accurate in this case. Mrs. Chavez' real complaint was that she lost her job due to friction in the office because of her Spanish heritage. The relief she obviously wanted was to have her job back as quickly as possible. She filed her complaint the day after she was fired. Office friction because of intolerance between co-workers seems a type of complaint especially suitable for conciliation. As to that charge, the record indicates a co-operative attitude by the employer in supplying the information sought by the EEOC. The breadth of the EEOC's investigation appears to have lost

view of the private interest that Mrs. Chavez had in being reinstated to her job.

Since the records concerning its patients were not relevant to any unfair employment charge covered by Title VII, Texas State Optical should not be put to the time, expense and inconvenience of revealing such records to governmental authority. I would affirm the decision of the district court.

APPENDIX C

§2000e—2. Unlawful employment practices—Employer practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Employment agency practices

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

Labor organization practices

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual

because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

§2000e—9. Investigatory powers—Examination of witnesses; production of evidence

(a) For the purposes of any investigation of a charge filed under the authority contained in section 2000e—5 of this title, the Commission shall have authority to examine witnesses under oath and to require the production of documentary evidence relevant or material to the charge under investigation.

Jurisdiction for issuance of compliance orders; attendance of witnesses or production of evidence out of State

(b) If the respondent named in a charge filed under section 2000e—5 of this title fails or refuses to comply with a demand of the Commission for permission to examine or to copy evidence in conformity with the provisions of section 2000e—8(a) of this title, or if any person required to comply with the provisions of section 2000e—8(c) or (d) of this title fails or refuses to do so, or if any person fails or refuses to comply with a demand by the Commission to give testimony under oath, the

United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, have jurisdiction to issue to such person an order requiring him to comply with the provisions of section 2000e—8(c) or (d) of this title or to comply with the demand of the Commission, but the attendance of a witness may not be required outside the State where he is found, resides, or transacts business and the production of evidence may not be required outside the State where such evidence is kept.

Petition for order to modify or set aside demand; specification of grounds; waiver of objections

(c) Within twenty days after the service upon any person charged under section 2000e—5 of this title of a demand by the Commission for the production of documentary evidence or for permission to examine or to copy evidence in conformity with the provisions of section 2000e—8(a) of this title, such person may file in the district court of the United States for the judicial district in which he resides, is found, or transacts business, and serve upon the Commission a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this subchapter or with the limitations generally applicable to compulsory process or upon any constitutional or other legal right or privilege of such person. No objection which is not raised by such a peti-

tion may be urged in the defense to a proceeding initiated by the Commission under subsection (b) of this section for enforcement of such a demand unless such proceeding is commenced by the Commission prior to the expiration of the twenty-day period, or unless the court determines that the defendant could not reasonably have been aware of the availability of such ground of objection.

Petition, in proceedings by Commission, for order to modify or set aside demand

(d) In any proceeding brought by the Commission under subsection (b) of this section, except as provided in subsection (c) of this section, the defendant may petition the court for an order modifying or setting aside the demand of the Commission.

Pub. L.88-352, Title VII, §710, July 2, 1964, 78 Stat. 264.